

CARES Act Programs for Businesses Too Large for the Paycheck Protection Program

Apr 02 2020

Posted By: Steven M. Szymanski

Practice Area: Business and Corporate Law

Many businesses challenged by the economic conditions caused by COVID-19 are seeking relief from the Paycheck Protection Program only to find themselves ineligible due to its employee eligibility requirements. Financial assistance may be on the horizon for mid-sized and larger businesses. This *Legal Update* discusses the anticipated financial assistance from the United States Treasury Department for mid-sized and larger businesses.

Many businesses have found that they do not qualify for financial assistance under the Paycheck Protection Program ("PPP"). However, a business in this circumstance still may qualify for a different assistance program under the CARES Act. The CARES Act set aside at least \$454 billion for financial programs to assist eligible businesses ("4003(b)(4) Programs"). The Federal Reserve and Treasury has yet to provide additional information regarding the terms of, and application processes for, loans originated under the 4003(b)(4) Programs.

Eligibility

The CARES Act provides that 4003(b)(4) Programs will apply to any business organized in the United States that has significant operations in the United States and the majority of its employees based in the United States and that has not received adequate economic relief in the form of loans or loan guarantees under another provision of the CARES Act.

Financial Assistance for Mid-Sized Businesses

Under the CARES Act, the Secretary of the Treasury is authorized to implement financial assistance programs which specifically target mid-size businesses. Mid-size businesses are both profit and nonprofit businesses with between 500 and 10,000 employees. Loans under the 4003(b)(4) Programs will not have an annualized interest rate higher than 2% and principal and interest will not be due and payable for at least 6 months after the loan is made. Unlike PPP loans, loans under the 4003(b)(4) Programs do not include a mechanism for forgiveness.

In order to receive a loan under the 4003(b)(4) program, the borrower will be required to certify:

- Uncertainty of the economic conditions as of the date of application makes the loan necessary for the support of ongoing operations.
- It will retain 90% of its workforce at full compensation and benefits until September 30, 2020.
- Borrower intends to restore not less than 90% of its workforce with all compensation and benefits that existed as of February 1, 2020 no later than 4 months after the termination of the public health emergency declared January 31, 2020.
- Borrower is domiciled in the United States with significant operations and employees in the United States.
- Borrower is not a debtor in a bankruptcy proceeding.
- Borrower is organized under the laws of the United States and has significant operations and the majority of its employees based in the United States.
- Borrower will not pay dividends with respect to its common stock or buyback any equity security listed on a national securities exchange, except to the extent required under a pre-existing contractual obligation.
- Borrower will not outsource or offshore jobs during the term of the loan and for 2 years after repayment.
- Borrower will not abrogate existing collective bargaining agreements during the term of the loan and for 2 years after repayment.
- Borrower will remain neutral in any union organizing effort for the term of the loan.

The 4003(b)(4) Programs for Mid-Size Businesses announced under the CARES Act would be in addition to the Main Street Business Lending Programs that are expected to be developed soon by the Federal Reserve, which was announced on March 23, 2020.

Financial Assistance for Larger Businesses

Loans, guarantees and other investments provided through the 4003(b)(4) Programs to larger business entities will be at a rate determined by the Treasury Secretary based on risk and current average yield on outstanding marketable obligations of the United States of comparable maturity. Again, unlike the PPP loans, these loans do not include a mechanism for forgiveness.

In order to receive a loan, loan guarantee, or other investment under the 4003(b)(4) Programs, an eligible business must agree that:

- For 12 months after the loan is no longer outstanding, the business will not buyback any equity security in the eligible business or a parent company listed on a national securities exchange;
- For 12 months after the loan is no longer outstanding, the business will not pay any dividends or make any capital distributions with respect to common stock of the eligible business; and
- The business will comply with the following compensation limits as applicable:
 - ◊ An officer or employee whose total compensation exceeded \$425,000 in 2019 may not receive more compensation than that officer or employee did in 2019, and may not receive any severance pay or termination benefits which exceeds twice the maximum total compensation received in 2019.
 - ◊ An officer or employee whose total compensation exceeded \$3,000,000 in 2019 may not receive more than the sum of \$3,000,000 plus 50% of the excess over \$3,000,000 of the total compensation received by the officer or employee in 2019.

Timing

The Federal Reserve should be providing additional information about the 4003(b)(4) Programs, including the application process and requirements, in the near future.

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.

